Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2005-138481-001 DT 03/13/2014

HONORABLE PAUL J. MCMURDIE

CLERK OF THE COURT
L. Mitchell
Deputy

STATE OF ARIZONA

SUSANNE B. BLOMO

v.

RYAN WESLEY KUHS (001)

SHARMILA ROY

CAROLYN H EDLUND
CAPITAL CASE MANAGER
COURT ADMIN-CRIMINAL-PCR
VICTIM WITNESS DIV-AG-CCC

RULING MINUTE ENTRY

The Court has reviewed Defendant's Petition for Post-Conviction Relief, the State's Response, and the Defendant's Reply, as well as the court's file. This is Defendant's first Rule 32 proceeding following the Arizona Supreme Court's affirmance of his convictions and death sentences in *State v. Kuhs*, 223 Ariz. 376 (2010).

The defendant was convicted by jury verdict of first-degree burglary as a predicate offense to first-degree felony murder. The jury unanimously found five aggravating factors at the aggravation phase: (1) a prior conviction for a serious offense based on the first degree burglary from this prosecution, A.R.S. § 13–751(F)(2); (2) a second prior conviction for a serious offense based on a second degree burglary, A.R.S. § 13–751(F)(2); (3) the especially heinous, cruel, or depraved manner of the murder, A.R.S. § 13–751(F)(6); (4) the commission of the murder while on release from prison, A.R.S. § 13–751(F)(7)(a); and (5) the commission of the murder while on probation for a prior felony, A.R.S. § 13–751(F)(7)(b). Following the penalty phase, the jury determined that the mitigation presented was not sufficiently substantial to call for leniency and returned a verdict of death.

On direct appeal, the Supreme Court found that:

The trial court acted within its discretion in making its competency determination without holding an evidentiary hearing;

Crying by the victim's mother during closing argument did not require a mistrial;

The evidence was sufficient to the support murder conviction;

Any error in the trial court's refusal to remove a potential juror for cause was not reversible error;

The penalty-phase instruction appropriately informed the jury of the sentencing options;

The court's impasse instruction to the deadlocked jury in the penalty phase did not coerce a jury verdict;

The penalty-phrase instructions appropriately instructed the jury as to the proper consideration of sympathy as a mitigating factor; and

The jury acted within its discretion in sentencing the defendant to death.

Defendant raises claims alleging the ineffective assistance of counsel at the sentencing and guilt phases of trial. Specifically, Defendant alleges:

VI. Ineffective Assistance of Counsel at Sentencing

(1) Defense counsel did not sufficiently support or supervise their mitigation specialist.

(2) Defense counsel did not prepare for mitigation with the degree of thoroughness necessary for effective representation.

(3) Defense counsel failed to ask Dr. Walter to prepare a report in sufficient time for them to request more testing if necessary, and to prepare him for trial testimony.

(4) Defense counsel was also ineffective in failing to engage a psychologist to identify and interpret the risk factors reflected in defendants' background.

(5) Defense counsel should also have found a psycho pharmacologist to tell the jury about meth-induced psychosis.

(6) Trial counsel did not challenge the prosecutor's repeated arguments to the jury not to consider brain damage or childhood abuse as mitigation

because those factors did not reduce the blameworthiness or the moral culpability of defendant.

(7) Trial counsel were inattentive during trial and failed to aggressively challenge all the prosecutor's assertions, especially that defendant admitted to stabbing a sleeping man.

(8) Trial counsel provided ineffective assistance in failing to make sure that the penalty phase jury instructions were complete and adequate.

(9) Trial counsel made no effort to tell the jury about the circumstances of the crime.

(10) Trial counsel provided ineffective assistance when they failed to review the State's rebuttal to their mitigation presentation in the form of a big book containing all the circumstances of defendant's prior crimes, as well as his entire jail and prison disciplinary records.

VII. Ineffective Assistance of Counsel at the Guilt Phase

(1) Counsel stipulated to their client's competency based upon the report of State psychologist Dr. Lewis that defendant was malingering, even though a scant two months previously, Dr. Potts and Sindelar had both found him to be incompetent.

(2) Trial counsel failed to retain a psycho-pharmacologist to rebut the State's evidence that defendant could not have been under the influence of meth at the time of the offense.

(3) Trial counsel failed to object when the prosecutor repeatedly referred to defendant's purported admission that he had stabbed a sleeping victim in the abdomen.

(4) Trial counsel should have retained an investigator to interview residents of the apartment complex about defendant and his friend and girlfriend, their drug abuse, and the real reason why victim's brothers got into an argument with defendant and Mr. Peterson.

(5) Trial counsel failed to ask for a voluntariness hearing regarding the "confession."

To avoid summary dismissal, a defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the outcome of the trial would have been different.

> Under Rule 32, a defendant is entitled to an evidentiary hearing if his petition for post-conviction relief presents a colorable claim, that is, "a claim which if his allegations are true might have changed the outcome." *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). A decision as to whether a petition for post-conviction relief presents a colorable claim is, to some extent, a discretionary decision for the trial court. *State v. Adamson*, 136 Ariz. 250, 265, 665 P.2d 972, 987 (1983). The trial court must be mindful, however, that when doubt exists, "a hearing should be held to allow the defendant to raise the relevant issues, to resolve the matter, and to make a record for review." *Schrock*, 149 Ariz. at 441, 719 P.2d at 1057.

State v. D'Ambrosio, 156 Ariz. 71, 73 (1988).

The Court finds that the defendant has failed to raise colorable claims for relief regarding sentencing phase claims 6, 7, 8, 9 and 10; and guilt phase claims 1, 2, 3, 4 and 5

Claims not colorable: Sentencing Phase

Claims 6 and 7: Prosecutor's arguments

During the sentencing phase, Defendant alleges that trial counsel failed to (6) challenge the prosecutor's repeated arguments to the jury not to consider brain damage or childhood abuse as mitigators because those factors did not reduce the blameworthiness or the moral culpability of defendant; and (7) aggressively challenge all the prosecutor's assertions, especially that defendant admitted to stabbing a sleeping man.

At the beginning of the sentencing hearing, this Court instructed the jurors as follows.

> Mitigating factors are not an excuse or justification for the offense, but are factors that in fairness or mercy may be considered by you as extenuating or reducing the degree of Defendant's moral culpability or blameworthiness.

(Nature of Hearing and Duty of Jury filed 8/30/2007 at 4.)

Guided by this instruction, the prosecutor argued that neither brain damage nor childhood abuse reduced defendant's moral culpability. Attorneys, including prosecutors in criminal cases, are given wide latitude in their closing arguments to the jury. *State v. Comer*, 165 Ariz. 413, 426 (1990). The prosecutor's closing remarks were proper as they were either directly supported by the record or could be reasonably inferred there from.

Notwithstanding the State's argument, the Court reminded the jury that they, as triers of fact, the jurors individually were to determine what constituted mitigation evidence:

> "Mitigating circumstances may be found from any evidence presented during the trial, during the first part of the sentencing hearing, or during the second part of

> the sentencing hearing," and that "[y]ou individually determine whether mitigation exists…"

(Nature of Hearing and Duties of the Jury filed 8/302007 at 2; *see also* at 4 (Mitigation); at 6-7 (Mitigation Assessment).)

Regarding claim 7, the initial reference to the victim sleeping came from Defendant himself, who in his interview quoted the victim as saying, "I'm sleeping." Defendant responded later in the interview to the detective's questioning by confirming that the victim was on the bed, on his back, and that when Defendant walked into the victim's apartment the victim was asleep on the bed. (Petition Exhibit G-1 at 66, 67, 70.)[1] Additionally, the evidence disclosed a large bloodstain on the bed that was at least consistent with the victim having been stabbed in that location. (*See* RT 8/21/2007 at 52.)

Prosecutors have "wide latitude…in closing arguments and counsel may comment on the evidence and argue all reasonable inferences therefrom." *State v. McDaniel*, 136 Ariz. 188, 197 (1983) *abrogated on other grounds by State v. Walton*, 159 Ariz. 571 (1989). The prosecutor's closing remarks were either directly supported by the record or could be reasonably inferred therefrom.

Further, at the conclusion of the guilt phase, defense counsel asked the jurors to watch the whole tape to confirm his recollection, saying, "I don't remember him saying that he was stabbing him while he was asleep." (R.T. 8/28/2007 at 60.) To the extent that there was a dispute regarding this argument, the jurors were capable of resolving the issue.

Finally, as to both claims 6 and 7, the Court instructed the jurors that "[t]he attorneys' remarks, statements and arguments are not evidence but are intended to help you understand the evidence and apply the law…" (Nature of Hearing and Duties of the Jury filed 8/302007 at 3; *see* Preliminary Jury Instructions filed 8/17/2007 at 6.)

The Court finds that sentencing phase Claims 6 and 7 are not colorable.

Claim 8: Jury instructions

Defendant alleges in Claim 8 that trial counsel failed to ensure that the penalty phase jury instructions were complete and adequate. Defendant specifically alleges, *inter alia*, that trial counsel was ineffective for failing to (1) request an instruction that the defendant need not testify or make a statement; (2) request particular mitigation instructions; and (3) request that "unable to reach a unanimous verdict" be included on the verdict form.

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[1] In the interview, Defendant acknowledged that the victim was asleep on the bed (at 70); that Defendant stabbed the victim while he was laying down on the bed (at 66), and also "after that first one [h]e had gotten up," (at 67). *See* Petition Exhibit G-1.

Non-testifying defendant instruction

Defendant faults counsel for failing to secure an instruction "stating that the defendant need not testify or make a statement, and because [he] did not allocate, the jury could have held it against him." Petition at 31.

At the guilt phase, the Court instructed the jury that Defendant need not testify, and that the decision was left to Defendant:

> "The State must prove guilt beyond a reasonable doubt. You must not conclude that Defendant is likely to be guilty because Defendant did not testify. Defendant is not required to testify. The decision on whether or not to testify is left to Defendant, acting with the advice of an attorney. You must not let this choice affect your deliberations in any way."

(Final Jury Instructions filed 8/28/2007 at 10.)

Jurors are presumed to follow the instructions as given and Defendant has not provided either case law indicating that the absence of a similar instruction in connection with allocution constitutes error or was prejudicial.

Other instructions

Defendant faults trial counsel for failing to secure instructions that (1) the totality of the mitigating factors against the totality of the aggravating factors 'is not a mathematical one;'" (2) "the jury was not required to find …a connection between a mitigating circumstance and the crime committed in order to consider the mitigation evidence, [a *Tennard*[2] instruction];" and (3) "law does not presume…the appropriate sentence...*State ex rel. Thomas v. Granville (Baldwin)*, 211 Ariz. 468 (2005)." Petition at 31, 32.

The Court instructed the jury to consider the "totality of the mitigating factors([ ] against the totality of the aggravating factors." The Court also instructed the jurors that "[a] juror may find mitigation and vote for a life sentence even if Defendant does not present any mitigation evidence…" and reminded them that "…each of you must determine whether, in your individual assessment, the mitigation is of such quality or value that it warrants leniency in this case. If a juror believes that the aggravating and mitigating circumstances are of the same quality or value, that juror is not required to vote for a sentence of death and may instead vote for a sentence of

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[2] *Tennard v. Dretke,* 542 U.S. 274, 285 (2004) (relatively low bar regarding "relevance" as to mitigation evidence; permits "the consideration of ... evidence if the sentencer could reasonably find that it warrants a sentence less than death...")

life in prison…." (Nature of Hearing and Duties of Jury filed 8/30/2007; *see also* Final Instructions filed 9/18/2007.)

Jurors are presumed to follow the instructions as given. The Court finds this issue is not colorable.

(Unable to reach unanimous verdict)

Defendant faults counsel for failing to secure a verdict form that "allowed for 'unable to reach unanimous verdict' in addition to 'life' and 'death.'" Petition at 32. The Court observes that verdict forms are not required but that, when provided, the verdict form must identify every verdict that may be returned by the jury:

> The law of this state has been, for some 60 years, that while not required, when the trial court submits forms of verdict to the jury, a form of every kind of verdict that is reasonably supported by the evidence is indicated. We agree with the statement by the Court of Appeals:
>
> > "Although the better practice which is now followed by practically all Arizona trial courts is to submit forms of verdicts to the jury for their convenience, the law does not require that this be done. However, when the court submits verdict forms to the jury, then the forms must show every kind of verdict that may be returned by the jury. (citations omitted)" *State v. Reynolds,* 9 Ariz.App. 131, 133, 449 P.2d 968, 970 (1969). See also *State v. Clayton,* 109 Ariz. 587, 600, 514 P.2d 720, 733 (1973).
>
> We have also stated that unless the verdict omission prejudices the defendant's rights, it will not be held reversible error. *State v. Gonzales,* 105 Ariz. 434, 436, 466 P.2d 388, 390 (1970); *State v. Garcia,* 102 Ariz. 468, 471, 433 P.2d 18, 21 (1967); *State v. Griffith,* 92 Ariz. 273, 275, 376 P.2d 134, 135 (1962); *West v. State,* 24 Ariz. 237, 248, 208 P. 412, 415–16 (1922). See also Ariz. Const. art. 6 § 27 (1960).

State v. Sanchez, 135 Ariz. 123, 124, 659 P.2d 1268, 1269 (1983).

The Court notes that a proper verdict in a criminal case constitutes "a jury's finding or decision on the factual issues of a case," *see* Black's Law Dictionary (9th ed. 2009); at the sentencing phase, a proper verdict is either "life" or "death." *See* A.R.S. § 13-751(E).

The statement, "unable to reach a unanimous verdict" is not a verdict, and is not properly-included on the verdict form.[3] Rather, "unable to reach a unanimous verdict" indicates

[3] As noted by the Arizona Supreme Court in *State v. Forde,* the verdict forms for each murder recited that the jury unanimously found that the defendant should be sentenced to either

the jury's inability to reach a verdict – an inability to reach a decision on the factual issues related to sentencing ("life" or "death"). An impasse is not a verdict; an impasse is a failure to reach a verdict and was actually addressed by the Court in this case.

Sentencing phase Claim 8, whether considered either individually or as cumulative error, is not colorable.

Claim 9: Circumstances of the crime

At the sentencing phase, Defendant alleges that trial counsel failed to make any effort to tell the jury about the circumstances of the crime. Defendant does not appear to propose that he be permitted to argue residual doubt, which is impermissible, but rather to present circumstances of the offense that fall short of being defenses to the crime. Defendant specifically claims that self-defense ("the struggle to gain control of the knife") and the alleged ongoing altercation between defendant and the victim's brothers would have provided mitigation evidence.

The Court finds that trial counsel's decision not to raise "self-defense" was reasonable as the evidence presented indicated that defendant had entered the victim's apartment with a knife and that Defendant initiated this altercation. Likewise, counsel's decision not to focus on a previous altercation that involved – not the victim – but his brothers appears reasonable.

The Court finds that sentencing phase Claim 9 not colorable.

Claim 10: Exhibit 128 - State's rebuttal

During the sentencing phase, Defendant alleges that trial counsel failed to review the State's rebuttal to their mitigation presentation in the form of a big book [Exhibit 128] containing all the circumstances of defendant's prior crimes, as well as his entire jail and prison disciplinary records.

In addition to incarceration records, Exhibit 128 also contained "…[defendant's] school records, his Project Challenge records, his employment records, "his everything we have on him, and it's all the police reports, which back up the diagnosis of antisocial personality disorder…" (RT 9/14/2007 at 88.)

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life or death and provided a line on which to indicate the chosen option. The defendant argued that the trial court erred by not providing a "not unanimous" option on the verdict forms to guide jurors in making individual sentencing decisions. The court rejected the argument noting that the jury instructions stated that each juror must make an "individual assessment" about the appropriate sentence and cautioned jurors "not [to] surrender [their] honest convictions as to the weight or effect of the evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict." Because the court appropriately instructed the jury that each juror must individually agree on a sentence to return a verdict, it was not necessary to provide a "not-unanimous" option on the verdict forms. *State v. Forde*, 315 P.3d 1200, 1230-31 (2014).

The Court specifically determined the Department of Corrections records, the jail records, work history, school records and Project Challenge records to be admissible. (R.T. 9/14/2007 at 90-91, 152.) The Court stated that it would consider police reports on a "police report by police report basis." The Court excluded them "under 403" acknowledging that "some of that stuff is still coming in through what is the thrust of mitigation…" (R.T. 9/14/2007 at 153-155.) Additionally, records that the doctor established would be consistent and relied upon by a mental health expert in making the diagnosis if antisocial personality were deemed admissible.

On the record, the parties agreed that following their review, Exhibit 128 was admissible "as altered. We made everything that we altered 128A or 001…so 001 doesn't come in. 128…is what we agreed on." (R.T. 9/18/2007 at 6.)

In her closing argument, the prosecutor began to describe the facts underlying an out-of-county burglary, contained "in the DOC records that we agreed were coming in." Trial counsel objected. (R.T. 9/18/2007 at 79.) The Court excused the jury, and with counsel reviewed the documents, determining that the reference was contained in a presentence report attached to the DOC records. The Court then clarified its previous ruling. (R.T. 9/18/2007 at 85-88.)

Trial counsel admitted during trial that by his objection he had succeeded in having documents relating to specific crimes for which defendant had not been convicted, as well as details relating to an aggravated assault removed from the book. (R.T. 9/14/2007 at 86-93, 104, 153-154; R.T. 9/182007 at 86.) He acknowledged that he "hadn't thought" to consider that the factual matters would be contained in numerous presentence reports.

Defendant does not identify specific attachments that were erroneously included. Defendant appears to object to the redundancy of some of the documents and to the fact that, at least in connection with one of the crimes, the victims would likely have testified on his behalf.

The Court separated the two phases of the trial, aggravation and mitigation. The Court's instructions distinguished between the first part of the sentencing hearing where "you found that aggravating circumstances exist," and the second part involving the determination of mitigating circumstances, from any phase of the trial, sufficiently substantial to call for leniency. (Nature of Hearing and Duties of Jury filed 8/30/2007 at 2.) The jurors are presumed to follow all of the Court's rulings.

The Court finds sentencing phase Claim 10 not colorable.

Claims not colorable: Guilt Phase

Claim 1: Competency

At the guilt phase, Defendant alleges that trial counsel unreasonably stipulated to Defendant's competency based upon the report of State psychologist Dr. Lewis that defendant was malingering, even though two months previously Dr. Potts and Sindelar had both found him to be incompetent.

Defendant filed a Motion for Rule 11 Pre-Screen on January 12, 2006 based on the defendant's self-reporting of auditory and visual hallucinations, which served as the basis for trial counsel's concern that "he may not be competent to assist" in his defense. Six years later, in connection with an April 2012 PCR evaluation, Dr. Toma made similar observations (""..the delusional beliefs, auditory hallucinations, ideas of reference and preoccupation with spiritual beliefs have continued to the time of this evaluation…"). Dr. Toma's impression, based on testing, was:

Axis I:	Schizophrenia, Paranoid Type	
	Rule Out	Schizoaffective Disorder, Bipolar Type
	History of	Polysubstance Dependence (Cannabis, Alcohol, cocaine)
Axis II:		
	Antisocial Personality Disorder	

Petition Exhibit A-1 at 24.

In response to a similar claim made on appeal, the Supreme Court reminded Defendant that counsel made no such stipulation to the defendant's competency:

> Kuhs complains that he was denied the hearing required by Rules 11.5 and 11.6 because the court allowed "the parties [to] stipulate[ ] to competency," and by doing so, the court violated its duty "to conduct a competency hearing" and "to make an independent inquiry to determine [whether Kuhs] was competent to stand trial."
>
> Counsel, however, did not stipulate to competency. Instead, they stipulated to the admissibility of Dr. Lewis's report and presented no other evidence regarding Kuhs's competency. In finding that Kuhs had been restored to competency, the trial court stated that it had reviewed Dr. Lewis's "final report as well as the pleadings filed pursuant to Rule 11." Because the same judge had presided over the initial Rule 11 proceeding, the court was familiar with the reports previously submitted by Drs. Potts and Sindelar. On this record, we conclude that the trial court did not abuse its discretion in making its competency determination without holding an evidentiary hearing.

State v. Kuhs, 223 Ariz. 376, 380 (2010); *see* Stipulation for Determination of Competency on Basis of Experts' [Dr. Jason L. Lewis] Reports filed 7/11/06.

A defendant is competent to stand trial if he has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and a "rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402

(1960). The Court is a *de facto* witness and may consider its own observations in making a competency determination. *State v. Glassel*, 211 Ariz. 33 (2005). Doubts about a defendant's competence may be removed by his conduct in court proceedings. *See State v. Conde*, 174 Ariz. 30 (Ct.App. 1992).

> Arizona Rule of Criminal Procedure 11.1 states that "[a] person shall not be tried, convicted, sentenced or punished for a public offense ... while, as a result of a mental illness, defect, or disability, the person is unable to understand the proceedings against him or her or to assist in his or her own defense." Rule 11.1 defines "mental illness, defect or disability" as "a psychiatric or neurological disorder that is evidenced by behavioral or emotional symptoms." *However, the mere presence of a mental illness, defect, or disability "is not grounds for finding a defendant incompetent to stand trial*." Ariz. R.Crim. P. 11.1. Rather, the test for competency is whether that mental illness or defect renders a criminal defendant "unable to understand the proceedings against him or her or to assist in his or her own defense." *Id.*

State v. Moody, 208 Ariz. 424, 444 (2004) [Emphasis added].

In connection with the PCR, Mr. Carr, who met with and observed Defendant on at least ten occasions[4] before stipulating to the admissibility of the report, and who continued to meet and observe Defendant thereafter and through the trial, wrote: "I did not think [Defendant] was mentally ill or incompetent to stand trial. He did spout Biblical stuff to me once or twice, which is why I asked for a Rule 11 evaluation, but when the State psychologist found that he was malingering, I did not question that evaluation. Now I feel that I should have asked for an evidentiary hearing as to my client's competence to stand trial." Petition Exhibit C-1 at #6. Notwithstanding any current recriminations, at the time of trial – which included the mitigation phase – counsel did not think Defendant was incompetent and thus, was justified in submitting the expert report to the trial court for decision rather than requesting a hearing.

Likewise, on the first day of trial, Mr. Carr discussed the belated disclosure of Dr. Walter's report: "…as is stated in the report, we have seen exactly what the report is talking about, but we don't feel it rises to the level of a full screen Rule 11. Everything the report talks about, we have also witnessed. He understands everything that is going on about it, but there are some delusions there that Dr. Walter has seen as well." (RT 8/20/2007 at 7.) This Court also observed Defendant over two months of concentrated trial time and, during that time, had no reason to question the Defendant's competence, nor were any issues raised by counsel who had

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[4] Including at least one occasion where it appears that Defendant created a "work-around" to use another inmate's telephone privileges to contact counsel. *See* Petition Exhibit C-2 at 1 (1/17/2006 (1.5 hours; "client called me via one of my other death penalty clients, stated this keeps his phone stuff good to go").

been representing him. The Court never saw evidence which would have warranted the Court ordering a competency hearing *sua sponte*.

Also, in the 2012 interview conducted by Dr. Toma in connection with the PCR it indicates that in 2012 defendant was "fully oriented to person, place and time…." and "…was generally alert and aware…" Further, Defendant was able to respond appropriately in connection with the tests administered, as well as to provide a substantial amount of personal background, becoming upset only when asked about his spiritual beliefs. Petition Exhibit A-1 at 12-13.

Although Defendant claims that his reported inability to assist Ms. Curtin in her mitigation efforts should have called his competency into question and mandated an additional competency evaluation, neither trial counsel's nor this Court's observations at the time suggested that Defendant was not sufficiently competent to understand the nature of the proceedings or to assist in his defense. Moreover, there is no indication that in the intervening years Defendant has received medication[5] that would explain his apparently-improved ability to assist PCR counsel.

Coupled with this Court's observations during the trial and Defendant's demonstrated ability to cooperate with PCR experts without being medicated, the Court concludes that guilt phase Claim 1 is not colorable.

Claim 2: Influence of meth

At the guilt phase, Defendant alleges that trial counsel failed to retain a psycho pharmacologist to rebut the State's evidence that Defendant could not have been under the influence of meth at the time of the offense. In fact, the State argued that Defendant may have been under the influence of meth at the time of the offense, but that any influence was minimal due to the relatively small quantity.

This Court properly instructed: "Temporary intoxication resulting from the voluntary ingestion, consumption, inhalation or injection of alcohol, an illegal substance or other psychoactive substances or the abuse of prescribed medications does not constitute insanity and is not a defense for any criminal act or requisite state of mind." (Final Jury Instructions filed 8/28/2007 at 7.)

Trial counsel did argue that the meth-ingestion rendered Defendant's statements involuntary, which properly put the effect of any drug use before the jury in that context.

The Court finds that guilt phase Claim 2 is not colorable.

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[5] *See* PCR Exhibit A-1 at 26; Exhibit A-2 at 6: "no anti-psychotic medication prescribed during incarceration at DOC."

Claim 3: Prosecutor's comment

At the guilt phase, Defendant alleges that trial counsel failed to object when the prosecutor repeatedly referred to Defendant's purported admission that he had stabbed a sleeping victim in the abdomen.

As stated in connection with sentencing phase claim 6, prosecutors have "wide latitude…in closing arguments and counsel may comment on the evidence and argue all reasonable inferences therefrom." *State v. McDaniel*, 136 Ariz. at 197. The prosecutor's closing remarks were either directly supported by the record or could be reasonably inferred therefrom. Consequently, trial counsel's performance was not deficient for failing to object to the prosecutor's statement.

Defendant claims that because the statement was made more than once, repetition made it more likely the jurors would believe that the victim was asleep. However, the Court instructed the jury that it must determine the facts based on the testimony of witnesses and exhibits admitted in evidence; immediately thereafter, the jury was instructed that "…statements or arguments made by the lawyers are not evidence…" (Preliminary Jury Instructions filed 8/17/2007 at 6.)

The Court finds that guilt phase Claim 3 is not colorable.

Claim 4: Additional witnesses

At the guilt phase, Defendant alleges that trial counsel failed to retain an investigator to interview residents of the apartment complex about Defendant and his friend and girlfriend, their drug abuse, and the real reasons why the victim's brothers got into an argument with Defendant and Defendant's friend, Mr. Peterson.

At the pretrial stage of the proceedings, Defendant noticed five guilt phase defenses that he considered: Self-Defense; Mere Presence; Lack of Specific Intent; No Criminal Intent; and Insufficiency of State's Evidence. (Notice of Defenses filed 9/26/2006.)

Trial counsel appeared to have initially hoped to resolve the matter through a plea agreement. Petition Exhibit C-3 at 6, 9 (11/20/2006 at Co-counsel meetings 2.0 hours; 6/10/2007 County Attorney contact "any chance of resolving this"). At trial, counsel challenged whether Defendant had ever been seen with a knife before the crime; whether he had purchased a knife; and the accuracy of Defendant's many stories.

Defendant was indicted for both premeditated and felony murder. Immediately before jury selection the State dismissed premeditation and proceeded to trial on felony murder; the underlying felony was burglary in the first degree. At that point, the defense strategy was to challenge the ability of the state to prove "that Ryan entered or remained unlawfully in or on a residential structure and did so with the intent, with intent to commit any theft or felony therein….I need to look at that word 'intent' because that's where we're going to be focusing

most of our time…" (R.T. 8/28/2007 at 53.) "…For every bad story he tells, there is one that doesn't give intent…he tells you through the whole thing, "I didn't go in to hurt him; I went in there to talk to him. I went in there to talk to him. I went in there to talk to him." (R.T. 8/28/2007 at 60.) "…They can't prove intent…if you don't get past this, you can't even get to the felony murder, and beyond a reasonable doubt, you cannot get past this burglary in the first degree, not beyond a reasonable doubt…" (R.T. 8/28/2007 at 68-70.)

The Court finds that trial counsel's decision to pursue a "lack of intent" defense was reasonable. At trial Defendant reasonably conceded that he was in the victim's apartment. His presence was supported by the evidence. He claimed lack of intent to commit the felony underlying the felony-murder charge. The defense was reasonable. The Defendant has not demonstrated that the proposed alternatives were any more reasonable than the strategy followed.

The Court finds that guilt phase Claim 4 is not colorable.

Claim 5: Voluntariness hearing

At the guilt phase, Defendant alleges that trial counsel's failure to ask for a voluntariness hearing regarding his confession constituted ineffective assistance of counsel. Defendant claims that his mental state at the time of the interview made it incumbent upon trial counsel to request a voluntariness hearing. Defendant claims he was disoriented, suffering from hallucinations and made references to messages from TV's, and also cited his slow responses with gaps of several seconds between the questions and the answers, to demonstrate that he "was not showing normal behavior and understanding." Petition at 46.

The recording of Defendant's statement was entered into evidence and the jury was instructed to determine the voluntariness of any confession made by Defendant "beyond a reasonable doubt" before considering the confession. (Jury Instructions filed 8/17/07 at 15 (defendant's statement "..not voluntary if it resulted from…will being overcome by use of violence, coercion or threats, or by any direct or implied promise, however slight…").

Nonetheless, after agreeing that he understood his rights under Miranda and providing identifying information, Defendant eventually acknowledged that something occurred, stating, "I want to believe it's all a dream..." Although he is unable to sequence the events ("I don't know what way it goes in order."), he stated, "I got the vibe that he wanted to fight." He then made additional statements regarding blood, the clothes he had changed out of, and the location of the clothing. The detective testified that he did not threaten, coerce, or make promises to Defendant to obtain the statement.

When considering the issue of voluntariness, the "[court] must look to the totality of the circumstances surrounding the giving of the confession." *State v. Montes,* 136 Ariz. 491, 496 (1983). A statement is not voluntary when there is "both coercive police behavior and a causal relation between the coercive behavior and the defendant's overborne will." *State v. Boggs,* 218

Ariz. 325, ¶44 (2008). "The state 'meets its burden when the officer testified that the confession was obtained without threat, coercion or promises of immunity or a lesser penalty.'" *Id.* (quoting *State v. Jerousek*, 121 Ariz. 420, 424 (1979)).

Assessment of the totality of the circumstances includes considering the suspect's maturity, education, and demeanor, the length and circumstances of the interrogation, and whether *Miranda* rights have been protected. *Doody v. Schiro*, 548 F.3d 847, 858-859 (9th Cir. 2008). The purpose of this assessment is to assist the court in determining whether, given the totality of the circumstances, the defendant's will was overborne into making a statement involuntarily. A defendant's statement to law enforcement is "prima facie involuntary, and the state must show by a preponderance of the evidence that the confession was freely and voluntarily made. [Citing *Montes*, 136 Ariz. at 496.]" *State v. Newell*, 212 Ariz. 389, 399 ¶39 (2006).

At the time of the interview, Defendant was 21, tested in 2007 with a full-scale IQ of 109 ("the upper part of the average range"), and had passed his GED on the first try, when he was about 17. *See* Petition, Exhibits B-7 at 3, B-2 at 38. His age and intelligence constitute additional support for the conclusion that his will was not overborne.

Defendant cites *Colorado v. Connelly* for the proposition that "[a] defendant's mental condition can make the confession involuntary if there is official action taking advantage of that fact." The Court disagrees with Defendant's interpretation:

> The purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution. See *United States v. Leon*, 468 U.S. 897, 906–913, 104 S.Ct. 3405, 3411–3415, 82 L.Ed.2d 677 (1984). Only if we were to establish a brand new constitutional right—the right of a criminal defendant to confess to his crime only when totally rational and properly motivated—could respondent's present claim be sustained.

Colorado v. Connelly, 479 U.S. 157, 166 (1986).

> We hold that coercive police activity is a necessary predicate to the finding that a confession is not "voluntary" within the meaning of the Due Process Clause of the Fourteenth Amendment.

479 U.S. at 167.

The Court finds that there is no support for a claim of government coercion sufficient to call into question the voluntariness of Defendant's confession. The Court finds that guilt phase Claim 5 is not colorable.

Colorable Claims: Sentencing Phase

Initially, the Court notes that Defendant has provided documents indicating that Mr. Leo Valverde, second chair trial counsel, was disbarred in January of 2013 for failing to competently represent another criminal defense client between September 2009 and July 2012. Defendant speculates that the "daily cocaine use" admitted to in connection with the disbarment "might have" occurred during Defendant's trial. The Court notes that subsequent disbarment of trial counsel responsible for mitigation efforts does not constitute *per se* ineffective assistance of counsel.[6]

In considering claims that may be colorable, the Court is guided by *Strickland*:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984).

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> We adhere to our stated standard. Neither suspension nor disbarment invites a per se rule that continued representation in an ongoing trial is constitutionally ineffective. Admission to the bar allows us to assume that counsel has the training, knowledge, and ability to represent a client who has chosen him. Continued licensure normally gives a reliable signal to the public that the licensee is what he purports to be—an attorney qualified to advise and represent a client. But it is an undeniable fact of experience that lawyers unhappily incur sanctions ranging from censure to disbarment; that sometimes that discipline flows from revealed incompetence or untrustworthiness or turpitude such as to deserve no client's confidence. All we need hold here is that a lawyer's services were ineffective on a case, not a per se, basis.

United States v. Mouzin, 785 F.2d 682, 698 (9th Cir. 1986)

Defendant must make a colorable claim not only that trial counsel's performance was deficient but also that as a result of the deficient performance defendant was deprived of a fair trial.

Claims 1 and 2: Mitigation

At the sentencing phase, Defendant alleges that trial counsel failed to (1) sufficiently support or supervise their mitigation specialist, and (2) prepare for mitigation with the degree of thoroughness necessary for effective representation. Defendant now proposes additional witnesses/evidence including relatives who can provide evidence of impoverished, transient, perhaps abusive/punitive childhood. The witnesses have little current contact with Defendant but rather provide background, somewhat cumulative to that adduced at trial.

The Supreme Court addressed the mitigating factors:

> Kuhs contended that the crime resulted from poor impulse control caused by ADHD or antisocial personality disorder. Kuhs was relatively young (twenty-one) when the murder occurred, he grew up in a poor family, and he was abused at least once at age nine by his mother's boyfriend. The record also contains some evidence of remorse and testimony from which the jury could have found that Kuhs was under the influence of methamphetamine, marijuana, or alcohol during the attack, although he was not so impaired as to preclude criminal responsibility.
>
> The mitigation in this case, however, was not compelling. Kuhs's alleged mental disorder is linked to the incident itself only insofar as it might have made Kuhs more impulsive. And Kuhs's childhood was not so difficult or abusive that it mitigates his actions in committing this murder. Moreover, there was evidence that Kuhs possessed average or above average intelligence. Under the highly deferential standard of review, we cannot conclude that the jury abused its discretion in not finding the mitigation sufficiently substantial to call for leniency and instead rendering a verdict of death in this case.

State v. Kuhs, 223 Ariz. at 388.

Ms. Curtin, mitigation specialist

In her affidavit, Ms. Curtin, the mitigation specialist at trial, claims:

> "…There were no defense team meetings…Mr. Valverde spent literally two minutes with me. Given their lack of involvement, I frankly gave up trying to do an adequate job…In my opinion, the report I produced was the worst report I had ever done."

Petition Exhibit D-1 at # 2, 3, 4; RT9/17/2007 at 8-10, 99-100; *see also* Trial Ex. #129, Mitigation Report – January 25, 2007. It was not her plan to testify; that changed at 10 on the morning of her testimony. (RT9/17/2007 at 8-10, 99-100.)

Notwithstanding Ms. Curtin's claims, the record identifies at least three separate occasions on which the trial court approved invoices in connection with her mitigation services. The non-sequential dates suggest that the record relating to payments to Ms. Curtin is not complete:

Bill for period July 23-August 31, 2006 for 16 hours ($640), ME 10/24/2006;

Bill dated 11/30/2006 for an unspecified amount, ME 1/23/2007; and

Bill for period December 27, 2006-January 25, 2007 for 22.5 hours ($900),

ME 4/12/2007.

Of the time spent (at least 38.5 hours shown above), Ms. Curtin spent:

> "[About eight hours spent with defendant is] probably less time than I spend in most mitigation cases. Ryan was a little bit reluctant to divulge information, so the last few sessions were largely repetitive."

(RT 9/17/2007 at 8-9.) Likewise, she testified that Defendant provided minimal contact information about the "collaterals" in his life who could have corroborated information that he himself provided. Had he done so, the State could less effectively have claimed he was making things up: "He was reluctant to divulge a lot of details of his life." (RT 9/17/2007 at 18.)

Also, notwithstanding her current claims, time sheets submitted by the Law Office of Nathaniel J. Carr III identify specific time spent by counsel related to Ms. Curtin, including at least one lengthy meeting:

8/23/2007 (4.5 hours "after trial prep for C. Curtin 9pm-1:30am"); and

8/24/2007 (6.0 hours "interview with Curtin").

Petition, Exhibit C-2.

Mr. Carr's mitigation involvement

Mr. Carr's claims that he was not involved in the mitigation preparation ("Valverde and I discussed which parts of the legal work would be done by me and which by him. As to the tasks that were in his share, I did not supervise….For example, he was supposed to prepare Dr. Mark Walter, the defense expert in the penalty phase, for his testimony, and I left that task to him, …" Petition, Exhibit C-1 at # 3.

The PCR record, provides what appears to be Mr. Carr's time sheets that reflect time that he himself spent addressing mitigation matters during "Co-Counsel Meetings" and "Client Contact" meetings:

2/21/2006 (3.0 hours);

3/2/2006 (1.5 hours);

3/11/2006 (1.5 hours);

3/25/2006 (3.0 hours);

4/30/2006 (1.5 hours);

6/6/2006 (2.5 hours);

6/17/2006 (2.5 hours);

8/8/2006 (2.5 hours "family member came in for interviews, she will not be good for our client in mitigation");

9/8/2006 (2.5 hours);

10/13/2006 (2.0 hours - contact with county attorney re: mitigation/aggravation);

12/17/2006 (3.0 hours);

1/31/2007 (2.5 hours "review of mitigation report and doc – bad news");

2/1/2007 (2.0 hours "more doc");

3/5/2007 (2.0 hours - in Court "Mit. State")

4/23/2007 (2.5 hours – mitigation research);

5/6/2007 + 5/25/2007 + 6/9/2007 (2.5 + 3 + 4 hours "mitigation review");

7/4/2007 (1.0);

8/19/2007 (4.0 hours "review report from Dr. Walter in the middle of trial on a Sunday – bad news for ***");

8/22/2007 (3.0 "After trial prep. For Dr. Walters 10pm-1:00am");

8/23/2007 (4.5 hours "after trial prep for C. Curtin 9pm-1:30am"); and

8/24/2007 (6.0 hours "interview with Curtin").

Petition, Exhibit C-2.

Additionally, Mr. Carr signed and filed the Notice of Mitigation Factors identifying the mitigating factors to include: "Age; Mental Health History; Family History; Drug and Alcohol History; And Any Other Fact the Jury may deem a Mitigating Factor." (Notice dated 5/8/2007.) This pleading also suggests Mr. Carr's involvement in mitigation matters. And, Mr. Carr argued strenuously for the admission of Dr. Walter's testimony, despite the "eve of trial" decision to call him as an expert.

The mitigation presentation

Ms. Curtin summed up the defense mitigation:

> State [Cross]: …Please tell the jury what those factors of mitigation were that you wrote about.
>
> Ms. Curtin: He experienced an abusive childhood in a very dysfunctional family. He was diagnosed with attention deficit\hyperactivity disorder as a juvenile. He is drug dependent with no record of drug treatment. He had been diagnosed with a psychotic disorder, not otherwise specified. He has religious obsessions, possibly delusions. *He sustained two brain injuries with the possibility of some brain damage.*

RT 9/17/2007 at 27. [*handwritten into report*; at 28].

The Court finds sentencing phase Claims 1 and 2 to be colorable. While there is certainly evidence in the record that disputes the claim presented, the Court believes that sufficient evidence calls into question the efficacy of the mitigation team in their preparation and investigation. In reviewing the PCR record it appears the defense could have done substantially much more than what was done and presented. The Court will hold an evidentiary hearing to allow Defendant to prove his claim.

Claims 3, 4 and 5: Expert retention

At the sentencing phase, Defendant alleges that trial counsel failed (3) to ask Dr. Walter [the defense expert] to prepare a report in sufficient time for them to request more testing if necessary and to prepare him for trial testimony; (4) to engage a psychologist to identify and interpret the risk factors reflected in defendants' background; and (5) to locate a psycho pharmacologist to tell the jury about meth-induced psychosis. The Defendant posits the need for additional experts who should have provided assistance at trial.

Based on arguments preserved in the record, trial counsel entered the trial anticipating that no mental health information would be presented; this strategy was shared with the jurors during *voir dire*. (*See, inter alia*, R.T. 8/13/2007 at 48; R.T. 8/14/2007 at 12, 73.) Immediately thereafter, trial counsel received Dr. Walter's report. Upon receipt of the report, counsel determined that Dr. Walter's testimony would be of assistance if the trial proceeds to the mitigation phase. Trial counsel received Dr. Walter's report literally on the eve of trial:

> "…Judge, his final conclusions of the report in terms of mitigation issues where he talks about he has problems with impulse control, judgment, learning from past experience, and adaptive reasoning. ADHD placed him at an increased risk for substance abuse, which he has, and in turn, any substance abuse will further impair his judgment and impulse control….And…I can tell you his final conclusions do not match what he told [trial counsel originally], and he did

> qualify that with, I need to run some final numbers, but his final report did not match what we were told…"

(R.T. 8/20/2007 at 9.)

Dr. Walter appears to have been the second doctor retained by trial counsel. See Petition Exhibit C-2, 1/31/2007 (2.5 hours "review of mitigation report and doc – bad news"), which predates trial counsel's retaining of Dr. Walter on June 13, 2007. (R.T. 9/14/2007 at 7.)

Strickland holds that:

> …[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. *See* Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U.L.Rev. 299, 343 (1983).

Strickland v. Washington, 466 U.S. 668, 689-90 (1984).

Additionally, in connection with the decision to seek specific expertise, the Supreme Court recently cautioned:

> We wish to be clear that the inadequate assistance of counsel we find in this case does not consist of the hiring of an expert who, though qualified, was not qualified enough. The selection of an expert witness is a paradigmatic example of the type of "strategic choic[e]" that, when made "after thorough investigation of [the] law and facts," is "virtually unchallengeable." *Strickland*, 466 U.S., at 690. We do not today launch federal courts into examination of the relative qualifications of experts hired and experts that might have been hired. The only inadequate assistance of counsel here was the inexcusable mistake of law—the unreasonable failure to understand the resources that state law made available to him—that caused counsel to employ an expert that *he himself* deemed inadequate.

Hinton v. Alabama, 13-6440, 2014 WL 684015 (U.S. Feb. 24, 2014).

Defendant proposes additional experts or witnesses to set forth somewhat contradictory themes: (Self-defense "struggle to gain control of the knife" – defendant (Petition at 32, #9), legal expert Everett (*see* Petition Exhibit C-5); Third-party defense – Defendant's argument that a witness identified him as wearing a white shirt even though a black shirt was found in the bag retrieved by police; Meth-induced psychosis - Dr. Stoehr (Petition Exhibit B-1); or Schizophrenic episode - Dr. Schwartz-Watts (Petition, Exhibit A-2). The Court has rejected as colorable the self-defense and third-party defenses. However, additional testimony regarding Defendant's mental health might have helped the trier of fact understand the circumstances of the crime and the effect of meth as outside factors accounting for defendant's behavior on the day of the murders.

The Court finds sentencing phase Claims 3, 4 and 5 to be colorable.

Based on the above, regarding the defendant's claims of ineffective assistance of trial counsel,

IT IS THEREFORE ORDERED dismissing sentencing phase claims 6 (Challenge to Prosecutor's Arguments), 7 (Challenge Prosecutor's Assertions), 8 (Jury Instructions), 9 (Circumstances of the Crime) and 10 (Exhibit 128); and guilt phase claims 1 (Competency), 2 (Psycho pharmacologist), 3 (Prosecutor's Assertions), 4 (Circumstances) and 5 (Voluntariness Hearing) .

Based on the above, regarding the defendant's claims of ineffective assistance of trial counsel,

IT IS FURTHER ORDERED granting an evidentiary hearing regarding sentencing phase claims 1 (Mitigation Support and Supervision), 2 (Mitigation Preparation), 3 (Expert Report and Preparation), 4 (Psychologist), and 5 (Psycho pharmacologist).